IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1186 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE R.P.DHOLAKIA
and
HON'BLE MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

RAJESHBHAI GAMAJBHAI IDAYAT

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 1186 of 2003

MR BS SUPEHIA for Appellant No.

MR IM PANDYA ASST.PUBLIC PROSECUTOR for State

CORAM : HON'BLE MR.JUSTICE R.P.DHOLAKIA
and

HON'BLE MR.JUSTICE SHARAD D.DAVE

Date of decision: 24/08/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE R.P.DHOLAKIA)

The appellant - convict prisoner has preferred the present appeal through District Jail, Junagadh and Mr.BS Supehia, has been appointed as his counsel. After receiving the records and proceedings of the Sessions Case No.32 of 2003 from the court of Additional Sessions Judge, Navsari, the office has placed this appeal before this court for admission.

2. Heard Mr.BS Supehia, learned counsel for the appellant and Mr.IM Pandya, learned Assistant Public Prosecutor for State at length.

3. Short facts of the prosecution case are such that on 7/7/202 at about 2 to 3 p.m. the appellant accused came to the house of the victim and at that time, the victim and her mother were present in the house. As the appellant accused was working in the agricultural field of neighbour namely Ghanabhai Gangarambhai, the accused and the complainant side were known to each other. After some chitchat, the appellant accused requested the mother of the victim to take the victim with him in the market under the guise of purchasing gram for the victim. Thereafter, instead of taking the victim to market, he took away the victim into the forest where he has allegedly committed the rape upon the victim. Thereafter, the appellant accused ran away and the victim came back to her house in weeping condition and narrated the entire incident to her mother and therefore, her mother called her relatives namely two brothers of her husband and others and in turn, the mother of the victim narrated the entire incident to them. As there was bleeding from the private part of the victim, she was taken to the Civil Hospital, Ahwa, where she was examined by Dr.Ajaykumar Thakorbhai and was admitted in the hospital and treated there. At the hospital, the mother of the victim lodged the complaint for the offences punishable under sections 361, 363 and 376 of the Indian Penal Code and same has been registered before the Ahwa Police Station vide CR No.I-57 of 2002. Thereafter, the investigation was started but the accused was absconding and he was arrested on 1/6/2003. After following proper procedure, he was sent for medical examination in the Civil Hospital, Ahwa and thereafter he has been sent in judicial custody. At the end of investigation, chargesheet has been submitted into the trial court and

as the offence in question is triable exclusively by the Sessions Court and as the Judicial Magistrate (FC), committed the case to the Court of Sessions, Navsari, same has been numbered as Sessions Case No.32 of 2003. The appellant accused appeared before the trial court and charge was framed against him on 25/7/2003 at Ex.3 for the offences punishable under sections 361, 363 and 376 of Indian Penal Code and as the accused pleaded not guilty and prayed for trial, the prosecution has examined the following witnesses to prove the charge against the appellant accused:-

Sr.No.	Particulars	Pw NO.	Ex.No.
1.	Anilbhai Sakarbhai, Panch witness of Panchnama of scene of offence Ex.81.	1	7
2.	Jasubhai Somabhai, Panch witness of Panchnama of seizure of clothes of the appellant accused Ex.10	2	9
3.	Madhubhai Shantaram Chaudhari Panch witness of Panchnama of seizure of clothes of the appellant accused Ex.10	3	12
4.	Yamaniben Ratanbhai Pavar, complainant - mother of the victim.	4	13
5.	Kaliyabhai Mangalbhai Pavar, uncle of victim.	5	16
6.	Dr.Ajay Thakor, Medical Officer of Civil Hospi. Ahwa who examined the victim on 7/7/2002.	6	17
7.	Robert Sempol Mistri, Panchwitness of panchnama of seizure of clothes of the victim which she had wared at the time of incident Ex.23.	7	22
8.	Sureshbhai Mangalbhai, uncle of the victim.	8	26

9. Ratanbhai Mangalbhai, 9 27
father of the victim.

10. Rajesh Gana Gavit 10 28
person in whose field,
the appellant was working
as agricultural labourer.

11. Dr.Dilipbhai Shivaji Gamir, 11 30
Medical Officer, Civil Hospi.
Ahwa who examined the accused
on 1/6/2003.

12. Ravindra Gangaram Sonavane 12 35
Panch witness of seizure of
clothes of the accused.

13. Bhaguben Ratanbhai, 13 37
oral evidence of the victim.

14. Ahemad Latif Navajuddin Shaikh 14 39
PSI Ahwa Police Station,
who recorded the FIR at
Civil Hospital, Ahwa.

15. Fatehsinh Laxmansinh Vasava 15 41
who has further investigated
the offence in question, as
the concerned IO Ex.14
transferred.
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4. The prosecution has mainly placed reliance on

the following evidence ;-

1. FIR Ex.15
2. Panchnama of Scene of Offence. Ex.8
3. Certificate issued by the medical Ex.18
officer for physical examination of
the victim.
4. Panchnama of seizure of the clothes Ex.23
of the victim.
5. Dispatch Note for sending the Ex.42
clothes of the victim to the FSL.

6. FSL Report with regard to clothes Ex.43
of the victim.

7. Arrest Panchnama of the accused. Ex.10

8. Panchnama of the seizure of the clothes of the appellant accused. Ex.11

9. Certificate issued by the Doctor regarding medical examination of the accused. Ex.31

10. Medical Case Papers of the accused. Ex.32

11. Dispatch note for sending the clothes of the accused to the FSL Ex.44

12. Report with regard to the clothes of the victim. Ex.45

13. FLS report regarding clothes of the accused. Ex.43

5. Thereafter, on submissions of closing purshis Ex.47, Additional Sessions Judge recorded further statement of the appellant accused under sec.313 of the Code of Criminal Procedure.

6. After having heard the learned counsel for the appellant accused and learned Assistant Public Prosecutor and considering the evidence on record, including the written submissions made on behalf of the appellant accused, the Additional Sessions Judge, Navsari passed judgement and order of conviction dtd.12/9/2003 convicting the appellant accused in exercise of powers conferred upon him under sec.235(2) of the Criminal Procedure Code for the offences punishable under sections 363, and 376. The Additional Sessions Judge has convicted the appellant accused for the offence punishable under sec.363 of Indian Penal Code for three years and awarded fine of Rs.300/- and in default of making payment of fine, further simple imprisonment of 15 days has been awarded. The Additional Sessions Judge has also convicted the appellant accused for the offence punishable under sec.376 of Indian Penal Code for 10 years rigorous imprisonment and awarded fine of Rs.500, and in default of making payment of fine, further simple imprisonment of three months and ordered to undergo both the sentences concurrently.

7. Mr.Supehia, learned counsel for the appellant has

mainly taken us through various documentary evidence as well as oral evidence, namely, evidence of the victim, mother of the victim - Yaminiben, uncle of the victim and the owner of the field wherein the accused was working as agricultural labourer. He has also taken us through the oral evidence of Dr.Ajaykumar Thakorbhai, Dilipbhai and Dr.Dilipbhai Shivajibhai Gamit along with medical certificate issued by the Doctor for examination of the victim as well as accused. He has drawn our attention to the case papers of the medical examination of the victim. Drawing our attention to the same, he has mainly argued that the only star witness is the victim herself as after the incident, she has immediately narrated the incident in detail to her mother and her mother in turn to other relatives i.e. two uncles of the victim and father of the victim. He has further argued that the only relevant evidence is the evidence of victim herself and looking to the age of the victim, this court may evaluate her evidence with due care and caution. It has also been argued that there are all possibilities of tutioning the victim by the parents of the victim and the police officers also.

8. However, at the end of arguments, he has restricted his arguments on the point of quantum of punishment and argued that considering the fact that the appellant accused is a young boy aged about 22 years, a lenient view may be taken, irrespective of the seriousness of the offence, by reducing the punishment from 10 years to 7 years. In support of his contention, he has placed reliance on the decision rendered by the Hon'ble Apex Court in the case of State of Chhattisgarh Vs. Derha, reported in (2004) 9 SCC 699 more particularly Head Note-F which reads as under;-

> "F" Penal Code, 1960, - S.376(2)(f) - Rape on a girl of eight years - Sentence - Reduction - Accused hardly eighteen years of age at the time of incident Already served about 6.1/2 years' imprisonment - Was married and had a family - In such circumstances, sentence of ten years' RI imposed by the trial court reduced to seven years' RI."

9. Drawing our attention to the said decision, he has argued that in the said cited case also, the accused was aged about 18 years, who was alleged to have committed rape on the girl aged about eight years, was convicted for the offence punishable under secs.376 and 376(2) for 10 years' RI. However, the Hon'ble Apex

Court, has reduced the punishment to seven years' RI. He has further argued that the said decision is squarely applicable to the facts of the present case and hence this Court may exercise its jurisdiction and reduce the sentence from 10 years' to 7 years'.

10. On the other hand, Mr.IM Pandya, has vehemently opposed this criminal appeal arguing that the appellant accused has committed a heinous crime by committing rape on a girl aged about 5 years and the prosecution has proved the charges levelled against the appellant beyond reasonable doubt and therefore, this Court may not exercise any discretion and may not show any leniency to the delinquent who has no respect for law and order. He has further argued that this is a serious offence and alarming the society and, nowadays such heinous offences are increasing and only the Court can control such situation and make such an atmosphere in the society where every one can move freely and easily and without any fear, by taking harshest view against such heinous crime doer and if this court would reduce the punishment, there would be adverse effect on the society. He has further argued that the impugned judgement and order of conviction is just and proper and the trial court has not committed any error while convicting the appellant and therefore, there is no reason worth the name to interfere with the impugned judgement and order of conviction, when the trial court has proved the prosecution case beyond reasonable doubt. In support of his arguments, he has placed reliance on the decisions of the Hon'ble Apex Court rendered in the case of Madan Gopal Kakkad Vs. Naval Dubey and another, reported in (1992) 3 SCC 204 wherein, in paras 57 and 58,- the Hon'ble Court has held as under:-

"57. Before parting with the judgement, with deep concern, we may point out that though all sexual assaults on female children are not reported and do not come to light yet there is an alarming and shocking increase of sexual offence committed on children. This is due to the reasons that the children are ignorant of the act of rape and are not able to offer resistance and become easy prey for lusty brutes who display the unscrupulous, deceitful and insidious art of luring female children and young girls. Therefore, such offenders who are menace to the civilized society should mercilessly and inexorably punished in the severest terms.

58. We feel that Judges who bear the Sword of justice should not hesitate to use that sword with utmost severity, to the full and to the end if the gravity of the offences so demand."

11. Though, learned counsel for the appellant has restricted his arguments on the quantum of punishment and has not challenged the entire judgement and order of conviction, for the satisfaction of our conscience, we have gone through the evidence on record namely, oral as well as documentary, including the evidence of victim, her mother, medical evidence etc. On going through the same, we are of the opinion that the evidence on record are trust worthy and consistent one. Further, the accused and the victim were known to each other as the accused was working in the field of neighbour of the victim and therefore, question of misidentification or false implication does not arise. Further, from the evidence on record, it has been established that the accused had taken away the victim with him with the permission of the mother of the victim, for purchasing the gram from the market for the victim and the mother of the victim had permitted the accused to take her daughter - victim with him. However, the accused, instead of taking the victim to the market for purchasing grain, took the victim to the forest and committed rape on the victim. After committal of the offence, the accused ran away and was not available for investigation. He was absconding for a period of about one year. Thereafter he was arrested due to sincere efforts made by the investigating officer and after his arrest i.e. after one year from the date of committal of the alleged offence, he was examined by the concerned doctor and therefore, the report of his physical examination would not help the appellant. On the other hand, the medical report of the physical examination of the victim, supports the version of the victim.

Thus, the prosecution has established and proved the charges levelled against the appellant accused beyond reasonable doubt and the Additional Sessions Judge has discussed each and every aspect of the matter in detail and has considered all the aspects of the matter and the and hearing both the sides and considering the evidence on record, the appellant has been convicted and awarded punishment as stated hereinabove.

12. So far as the decisions on which the learned counsel for the appellant has placed reliance are concerned, we are in quite agreement with the ratio laid down by the Apex Court in the said cited decisions.

However, facts are quite different as in the said cited case, the accused was hardly 18 years who had committed rape on the girl aged about 8 years, the accused had undergone 6.1/2 years, he was married and had a family. In the decision cited by the learned counsel for the appellant, the High Court acquitted the accused for the offence under ses.376 and considering the facts and circumstances of the case and evidence on record of the said case, the Hon'ble Apex Court reduced the sentence from 10 years' RI to 7 years RI. Thus, the facts of the present case and the facts of the case cited, are quite different and therefore, the appellant can not get benefit of the cited judgement of the Hon'ble Apex Court.

13. It is pertinent to note that in the said decision of the Apex Court cited by the appellant, the Hon'ble Court has in para 6 held that law is well settled in regard to the evidence of a prosecutrix. It is well established that if the court is satisfied from the evidence of the victim, a conviction can be solely based on such evidence. Same can be done because the prosecutrix is no more treated as an accomplice in the crime. However, in the case on hand, there are medical evidence on record corroborating the version of the victim. Further, in the said decision cited by the appellant, the Hon'ble Apex Court in para 8 has held that absence of injury on private part of accused, will not be of much help to the accused as he was medically examined four days after the incident and in the present case, the appellant - accused has been examined after a period of one year. In view of the aforesaid facts and circumstances, the appeal is required to be dismissed.

14. In the result, this appeal is dismissed.

(R.P.DHOLAKIA,J.)

(SHARAD D.DAE,J.)

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